Supreme Court, U.S.
FILED

98 960 DEC 2 1998

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

DEBORAH H. COBB,

Petitioner,

v.

E. I. duPONT de NEMOURS and COMPANY, a Delaware corporation, RICHARD KNOWLES, ELBERT PRICE, LESTER GORE, SCOTT RENDINELL, LOU P. MICELI, PAMELA POKRZYWA, REUBEN W. HOLLAND, M.D., and ROBERT L. LEADBETTER, M.D.

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Under the Continuing Violations Doctrine does a denial of employee benefits constitute a discreet, interrelated discriminatory action as taken against an employee in a hostile work environment, or does it constitute strictly a violation of the Employee Retirement Income Security Act which is a distinct and separate legal claim.

B. Can a federal District Court refuse to consider as material evidence in a claim of wrongful denial of disability benefits to an employee/applicant, medical records admittedly in the possession of the employer but which were omitted by that employer in its "administrative record" upon which a denial of benefits was based?

C. Does it constitute an abuse of discretion by a federal District Court to prohibit all discovery into a specific hostile work environment, wherein the District Court then grants summary judgment based directly upon the Petitioner's failure to produce sufficient evidence to prove the existence of a sexually hostile work environment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW _____ i

TABLE OF AUTHORITIES _____ iv

OPINIONS BELOW _____ 1

JURISDICTION _____ 2

LAW INVOLVED _____ 3

STATEMENT OF THE CASE _____ 3

REASONS FOR GRANTING WRIT _____ 10

I. The wrongful denial of employee benefits is a discriminatory action by an employer to cause harm to an employee which constitutes an interrelated and discreet act of discrimination against that employee under the Continuing Violations Doctrine _____ 10

II. The District Court's ruling during the trial of the ERISA claim was clearly erroneous when ruling to refuse admission into evidence at trial of the medical file as maintained by the defendants on their employee and which the defendants arbitrarily had withheld from the administrative record to be reviewed to facilitate a denial of benefits _____ 16

III. A District Court has abused its judicial discretion in finding that insufficient evidence was proffered to prove a claim of hostile work environment wherein the court has prohibited all discovery pertaining to the subject workplace environment _____ 20

CONCLUSION _____ 24

TABLE OF AUTHORITIES

Cases — Page

Andrews v. City of Philadelphia, 895 F. 2d 1469, 1484 - - - - - - - - - - - - - - 21,22

Bernstein v CapitalCare, Inc., 70 F.3d 783, 787 - - - - - - - - - - - - - - - - - - - 17

Brinkley-Obu v Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994) - - - - - - - - - -10

Broderick v. Ruder, 685 F. Supp. 1269 - 22

Brogan v Holland, 105 F.3d 158, 161 - - - - - - - - - 17

Burns v. McGregor Elec. Indus., Inc., 955 F. 2d 559 - - - - - - - - - - - - - - - - - - - 21

Celotex Corp. v. Catrett, 477 U.S. 317, 196 S. Ct. 2548 (1986) - - - - - - - - - 20

Ellison v. Brady, 924 F.2d 872 - - - - - - - - - - - - - 22

Jensen v Frank, 912 F.2d 517 - - - - - - - - - - - - - - 11

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) - - - - - - - - - - - - - - - - 21,23

Pokol v E.I. Du Pont de Nemours and Co., 963 F. Supp. 1361, 1370-71 - - - - - - - - - - - - - 17

Pullman Standard v. Swint, 465 U.S. 273 (1982) - - 24

Quesinberry v Life Ins. Co. of North America, 987 F.2d 1017 - 19

Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 - - - - - - - - - - - - - - - - - 21, 22

Vance v. Southern Belle Tel. & Tel. Co., 863 F. 2d 1503, 1510 - - - - - - - - - - - - - - - - - 21

Statutes and Rules

28 U.S.C. §1254(1) - 3

42 U.S.C. §1983 - 3

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OPINIONS BELOW

The orders entered in the United States District Court for the Southern District of West Virginia dated April 22, 1997, April 23, 1997, and March 31, 1998, and which are contained in the appendix hereto.

The decision entered by the United States Court of Appeals for the Fourth Circuit dated August 4, 1998, affirming by unpublished per curiam opinion the aforementioned orders of the District Court, which is also contained in the appendix hereto.

JURISDICTION

Your Petitioner brought suit in the Circuit Court of Kanawha County, West Virginia, on July 28, 1995, for intentional work-related injury pursuant to the West Virginia state laws pertaining to workers' compensation, fraudulent concealment, employment discrimination pursuant to the West Virginia Human Rights Act, and the wrongful denial of employee disability benefits. The defendants removed this action based upon their contention that the sole count alleging denial of employee disability benefits as violative of the Employee Retirement Income Security Act mandated the removal of the entire cause of action to the United States District Court for the Southern District of West Virginia.

Your Petitioner reserved her right to object to this removal given that Petitioner believed the denial of employee benefits constituted a discreet and interrelated adverse employment action which was part and parcel of the continuing pattern of acts of discrimination committed against your Petitioner herein. However, Petitioner knew this position would not prevail with the instant District Court given its previous rulings on remand to a state court.

The District Court did subsequently dismiss Petitioner's entire cause of action with sole the exception of the ERISA count. The District Court proceeded to conduct

a bench trial on the material issue of fact pertaining to the alleged ERISA violations which the court segregated out as separate and distinct from all claims of the defendants' discriminatory conduct toward the petitioner. Pursuant to this trial, the Court granted judgment in favor of the defendants on the issue of the wrongful denial of benefits which order has been previously referenced and is contained in the Appendix.

The Petitioner proceeded to appeal pro se the dismissal of her case and the findings of the District Court as pertaining to her claims of discrimination, inclusive of the claims of handicap discrimination, sexual harassment and hostile work environment, and the wrongful denial of disability benefits to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the findings of the District Court by an unpublished opinion submitted August 4, 1998, which is contained in Petitioner's Appendix.

It is from this decision of the Court of Appeals that Petitioner now appeals pursuant to 28 U.S.C. §1254(1).

LAW INVOLVED

The law involved in this matter is predicated upon employment discrimination in violation of Title VII of the Civil Rights Act of 1964 and a denial of her rights in contravention of 42 U.S.C. §1983.

STATEMENT OF THE CASE

Petitioner, Deborah H. Cobb, was employed by E.I. duPont de Nemours and Company (Dupont) in 1976 at age eighteen. She began her employment with this company

immediately upon graduation from high school and through her subsequent years of employment with Dupont, rose to the position of shipping coordinator for the entire plant operation wherein she worked.

Her employment with Dupont was uneventful until the arrival of a new plant manager, Richard Knowles. Prior to Mr. Knowles' arrival, the Petitioner had steadily progressed to the position of the shipping coordinator and had enjoyed favorable performance ratings and steady promotions at the Dupont Belle Chemical Plant. The Petitioner's entire work history was solely with this one employer and her performance was always found to be very satisfactory, despite the Petitioner having an increasingly demanding job requiring substantial overtime and entailing heavy job stress from the responsibility of shipping hazardous substances to various destinations.

During the week of Thanksgiving, 1991, Petitioner first received a call from her immediate supervisor at that time, Kerry Crawford, who was admittedly intoxicated and who propositioned her requesting sex. He further informed her that "Dick Knowles would like to f--- [her]." (expletive deleted)

This incident was properly and promptly reported to Lester Gore, an Employee Relations Specialist, and his immediate superior, the Superintendent of Employee Relations, Elbert Price. The resulting action taken by Dupont management was the offending supervisor, Crawford, was promoted shortly thereafter. Ms. Cobb began to experience repercussions from the incident almost immediately, particularly from Mr. Crawford.

Shortly after this incident Richard Knowles also approached the Petitioner and began a pattern of conduct, such as pressing his body against hers requesting that she feel his beeper vibrate. He asked Petitioner if she would like to hold his beeper, while at the same time pressing portions of his anatomy against her. Defendant Knowles continued to routinely pay particular attention to Ms. Cobb in this manner, showing her inappropriate attention and preferential treatment. He openly sought her out to engage her in conversation and openly engaged in flirtatious behavior with her. Petitioner and Knowles did engage in this type of sexual horseplay, involving light sexual banter and some physical touching. However, it did not progress beyond this level of interaction which Ms. Cobb believed could be maintained on a harmless basis. The Petitioner herein had not discouraged Mr. Knowles' attention but believed it was simply a flirtatious type of interaction which she was not free to rebuff.

By the winter of 1992, Ms. Cobb had begun to experience more and more difficulty on the job. Suddenly, she began to have problems with management at various levels at this plant. Her supervisor, Lou Miceli, had limited contact with her and refused to discuss any of her work concerns, even as affecting her duties as shipping coordinator. In January, 1992, Mr. Miceli withheld from her for a number of months a monetary award she had earned for outstanding effort on the job and simply explained that he had forgotten that it was in his desk. Ms. Cobb had to complain, to which the plant manager had to intervene before the award was received.

One of Ms. Cobb's co-workers turned violent and physically abusive. This co-worker began sabotaging Ms.

Cobb's work and anonymous hate mail was suddenly appearing, some directed toward Ms. Cobb and some to her co-workers. When Ms. Cobb went to Lou Miceli, her supervisor, to discreetly address the problem, it resulted in Ms. Cobb being severely disciplined as unable to get along with her co-workers. The Petitioner herein was required to sit in an isolated locked basement room for three days writing and rewriting the same essay on the "Dupont People Principles." This was a serious corrective action utilized by specifically Richard Knowles only when he was considering the termination of an employee.

Following this serious incident of corrective action, problems continued to escalate until Ms. Cobb in desperation contacted the Dupont employee hotline in the Company's corporate offices in Wilmington, Delaware, to place a formal complaint pertaining to the aforementioned treatment to which she was being almost daily subjected. The Petitioner expressed her grave concerns and fears and sought help with a very hostile work environment that had become intolerable and exceedingly stressful and in Petitioner's perception completely out of control. False rumors were openly being spread that she had engaged in sexual relations with the plant manager. At this time, Ms. Cobb began to fear that she had been targeted for discharge by Mr. Knowles and her other immediate supervisors.

Petitioner had previously sought help through appropriate channels from within the Belle plant. She had attempted to discuss her adverse work conditions and related problems with Lou Miceli, Lester Gore, Elbert Price, and even Dr. Robert Leadbetter, the superintendent of plant medical services. Ms. Cobb's diagnosed health problems

were escalating and becoming substantially worse as fully documented by Dupont medical personnel in the Petitioner's plant medical file. Ms. Cobb was an asthmatic who had been diagnosed with asthma in 1989. She was also diagnosed with severe chronic fatigue syndrome and fibromyalgia in 1992.

In July, 1992, Ms. Cobb's assigned employee relations specialist, Lester Gore, had come to her home presumably to confidentially discuss with her the on-going work problems. At that time, he entered her bedroom while Ms. Cobb was distracted outside with her son. When Ms. Cobb found Mr. Gore exiting her bedroom upon her return, defendant Gore asked her to raise her shirt and show him her breasts. Prior to this incident, Gore had tried on at least five occasions to hug and kiss Ms. Cobb at work to presumably comfort her as a friend. These sexual overtures were made with the inducement that presumably defendant Gore could help eliminate any work problems Ms. Cobb was experiencing as he was extremely close to the plant manager and enjoyed the benefits of this relationship.

In August, 1992, as a result of the aforementioned complaint to the Dupont hotline, meetings were conducted by two representatives from the corporate offices of Dupont, Mr. Bill Spenla and Ms. Cheryl Jennings. During these meetings, Richard Knowles, Lester Gore, and Lou Miceli were present. Mr. Spenla and Ms. Jennings had already met with certain plant management prior to any meeting with the complainant, Ms. Cobb. The corporate representatives had presumably solicited handwritten memos from both Mr. Knowles and Mr. Miceli wherein they severely maligned Ms. Cobb and she was referenced as "pure evilness" and a manipulative, dangerous employee. No definitive action was ever taken following

these meetings and Ms. Cobb was eventually simply dropped by these corporate employee relations representatives who just basically ignored her attempts to contact them.

During one of these meetings as conducted in August, 1992, defendant Knowles became openly hostile and was extremely abusive and overtly physically threatening toward Ms. Cobb as witnessed by Mr. Spenla and Ms. Jennings. He cursed and yelled at her in front of corporate representatives. He also was requested to prepare the devastatingly malicious handwritten memo in which he referred to the Petitioner in extremely derogatory terms and referred to her as "evilness". This conduct elicited no action by this company to resolve this explosive and volatile situation. Ms. Cobb was simply left to deal each day with this hostility.

Scott Rendinell, another of Ms. Cobb's supervisor, openly advised Petitioner that he did not want to even be informed of anything occurring to her due to defendant Knowles' openly known attitude toward her. He also told her that no accommodations or physical modifications to reduce contaminants in her work area would be made to address her diagnosed physical conditions as Dupont was under a cost cutting mandate. Petitioner contends this extreme cut back in routine maintenance applied only to her and as Petitioner's husband was in management at the same chemical plant, Petitioner was in possession of facts to support this contention.

By January, 1993, no constructive or definitive changes had occurred to modify, alter, or in any way improve Petitioner's work environment, including to accommodate her disabilities. Ms. Cobb believed that her termination was imminent. Richard Knowles' conduct was openly cold and

hostile toward her and she was being ignored by even her co-workers.

As late as September, 1993, Lester Gore was persisting in his sexual overtures and offered Ms. Cobb an intimate picture of his genitalia just before a staff meeting was to commence. She simply broke down and cried out of both fear and embarrassment at this conduct, but this time took no formal action and made no complaint, confiding only in a close friend and her husband. Ms. Cobb was now in fear for her safety and well-being and was suffering severe health problems while waiting to be terminated for some pretextual reason.

By early 1994, Ms. Cobb's work load continued to be excessive and this Petitioner was suddenly advised by her immediate supervisors that even her parttime assistant was being taken away. She was performing all of her duties alone and without any relief. She was the only clerk in this situation at the Dupont Plant.

Petitioner was forced to resign in September, 1994. She left an irreplaceable job given her level of education and gave up a substantial salary due to an intolerable and sexually hostile work environment. Ms. Cobb's health had deteriorated significantly and by May, 1994, she was experiencing persistent breathing problems, recurrent painful skin lesions, and severe chronic fatigue. All of these problems were being documented in the Dupont plant medical file, as well as stress-related symptoms noted by plant physician, Reuben Holland.

Ms. Cobb had filed a grievance with the Equal Employment Opportunity Commission while still employed by Dupont to attempt to salvage her job but following her

resignation and the repeated denials of any employee benefits which she clearly needed, Ms. Cobb filed suit in the Circuit Court of Kanawha County, West Virginia on July 28, 1995.

Upon resigning her employment, Ms. Cobb had contemporaneously applied for disability retirement benefits and was denied these benefits three times. Dupont chose for some reason not to include any of the very relevant employee's medical records, as routinely maintained by the Dupont medical personnel at Dupont's local plant, in the "administrative record" upon which these denials of benefits were allegedly based. Ms. Cobb also applied for Workers' Compensation benefits which Dupont opposed vigorously.

REASONS FOR GRANTING WRIT

I. The wrongful denial of employee benefits is a discriminatory action by an employer to cause harm to an employee which constitutes an interrelated and discreet act of discrimination against that employee under the Continuing Violations Doctrine.

The withholding of pay increases, the denial of promotions, or the failure to hire based on patterns of discrimination are easily and clearly cognizable as continuing violations of employees' rights as protected under various Civil Rights Acts. In *Brinkley-Obu v Hughes Training, Inc.*, 36 F.3d 336 (4th Cir. 1994), the Fourth Circuit Court of Appeals held that a continuing violation under Title VII can be established by showing a pattern of discrimination through repeated and continual incidents of employment

workers. ERISA should not be utilized as a means to dilute and distract from workplace discrimination by focusing only on the standard of abuse of discretion. Discriminatory conduct designed to harm far exceeds the limited evidentiary issues entailed in an abuse of discretion review.

In the instant case, Ms. Cobb was found by the District Court to have failed to show that she was limited in any life activities, despite the defined physical restrictions arising from her asthma, chronic fatigue syndrome, and fibromyalgia. The defendant was in full possession of extensive plant medical records demonstrating the physical effects of her disabilities upon her daily job activities. The defendants repeatedly denied her an incapability pension which was made available to any employee with far less years of service than the Petitioner herein and far less severe disabilities. This particular benefit clearly does not require total and permanent disability but only an inability to work within Dupont and was denied to a veteran employee who was a diagnosed chronic asthmatic with other significant physical problems. An incapability retirement affords Dupont employees the opportunity, if desired, to change their jobs without a significant loss of income. Dupont denied the Petitioner herein this employment benefit afforded her co-workers.

Ms. Cobb, as an asthmatic working in a chemical environment, may or may not have been effected by that environment, but the extent to which this employer attempted, or failed to attempt, to accommodate and maximize her ability to remain employed cannot be fairly judged without a coherent and related assessment of the manner in which this

employer subsequently treated her when she left employment with Dupont after eighteen years of service.

It is Petitioner's contention is that an employer cannot claim that an employee is not handicapped or has been adequately accommodated, if handicapped, without due consideration being given to the treatment of that same employee in the event that necessary employee benefits should be applied for. The withholding of an employee benefit certainly can occur, not simply due to an arbitrary and capricious decision-making process in reviewing medical reports, but as a definite part of a calculated scheme and intended pattern of discrimination against a particular person or a particular class of individuals.

In arguendo, to deny a woman a disability retirement while granting it to men with like or similar conditions because they are deemed bread winners and women are not, is not a simple matter adequately addressed by ERISA alone, but also constitutes an overt discriminatory action rooted in prejudice against women, and is, therefore, violative of Title VII. The evidentiary issues entailed in both instances are significantly different and entail a varied legal review by the courts. More importantly, the denial of this benefit may be the final, related act of discrimination against that female employee in a series of adverse employment actions. To review medical reports in isolation from the overall work environment and related employee actions previously taken, deprives the litigant of the benefit of a comprehensive evidentiary picture. Moreover, the medical reports submitted become less dispositive of the legality of an employer's decisions, if co-workers with similar or far less severe conditions are granted benefits when a plaintiff was

repeatedly denied them. These issues address and reflect on much broader matters of employment discrimination.

Petitioner herein states that the denial of any disability benefits to her should have required a full evidentiary development that exceeded the restricted review of the alleged "administrative record" as permitted by the District Court. The "administrative record" did not contain any portion of the plant medical file of Dupont. The examination of the award of benefits to other co-workers with chronic fatigue syndrome was essential to Petitioner's case, and was directly probative in establishing that the Petitioner may have been treated disparately. The refusal to consider the disparate treatment accorded Ms. Cobb, as opposed to her co-workers, or to consider a diagnosed asthmatic working in a chemical environment as being incapable of maintaining that particular employment, certainly may conceal a bias prohibited by Title VII. These issues can not be fully or adequately addressed if courts can segregate out and hold separate and apart the alleged denial of employee benefits as not possibly being a discreet and interrelated act of further discrimination by a defendant.

Petitioner submits that the withholding of any employee benefit clearly earned while one maintained his or her employment, which is not considered by a court as a discreet and possible interrelated act of discrimination, diminishes its evidentiary and legal significance to a case, and may, in fact, serve to impede or thwart a broader cause of action wherein discrimination is the basic foundation upon which the tortious conduct was built and related employment actions were undertaken.

Petitioner requests that a writ of certiorari be granted to review the relevance and materiality existing between Petitioner's allegations of handicap discrimination and sexual harassment, and the actual treatment of the Petitioner upon application for available employee benefits. The Petitioner herein has been found by the Social Security Administration to have been totally and permanently disabled since leaving her employment with Dupont in 1994, and has not been able to engage in any gainful occupation since then. She has suffered multiple hospitalizations and is undergoing significant medical care and treatment to maintain her activities of daily living. Yet, a federal District Court was able to find that the medical evidence of disability was insufficient in this matter to even establish handicap. (Appendix A) Moreover, a denial of all required and necessary employee benefits in this case was held to be both reasonable and legally nondiscriminatory. Petitioner contends that a failure to consider the denial of benefits in her case as an act of overt discrimination under the Continuing Violations Doctrine, was both legally inappropriate and directly prejudiced her ability to sustain this cause of action.

II. The District Court's ruling during the trial of the ERISA claim was clearly erroneous when ruling to refuse admission into evidence at trial of the medical file as maintained by the defendants on their employee and which the defendants arbitrarily had withheld from the administrative record to be reviewed to facilitate a denial of benefits.

The employee welfare benefit plan maintained by Dupont and as administered by Dupont's Board of Benefits and Pensions in this case, was judicially reviewed by the District Court under the abuse of discretion standard. The abuse of discretion standard was applied by the Court as the plan at issue grants the administrator discretionary authority to determine eligibility for benefits or to construe terms of the plant. E.g., *Bernstein v CapitalCare, Inc.*, 70 F.3d 783, 787 (4th Cir. 1995) (citing *Firestone Tire & Rubber Co. v Bruch*, 489 U.S. 101, 115 (1989). In *Pokol v E.I. Du Pont de Nemours and Co.*, 963 F. Supp. 1361, 1370-71 (D.N.J. 1997), the Court found that a denial of benefits under Dupont's total and permanent disability benefit plan is to be determined under the arbitrary and capricious standard, which the court viewed as essentially the same as the abuse of discretion standard. Under the standard, the Board's decision is to be upheld if it is reasonable; that is, if it "is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence." *Brogan v Holland*, 105 F.3d 158, 161 (4th Cir. 1997) (quoting *Bernstein v Capital Care, Inc.*, 70 F.3d 783, 787 (4th Cir. 1995).

In its consideration of the denial of benefits to Deborah Cobb, the District Court excluded from evidence any consideration of the Dupont medical file as maintained by the local plant medical staff. This file had numerous entries, medical records, and diagnostic results acquired and accumulated through the years of the Petitioner's entire employment with Dupont. The Court held that all such medical evidence as clearly in the possession of Dupont, but not forwarded by local plant management for review as part

of the administrative record, would be totally excluded and entirely disregarded at trial of the alleged ERISA violations.

Petitioner asserts that any failure by an administrator to review all relevant medical evidence readily available to them as clearly relevant to an employee's state of health and which documents on-going problems on the job is absolutely arbitrary and capricious, particularly when the administrator's denial was based on an alleged insufficiency of "objective medical evidence". The Petitioner submits that Dupont doctors observing the employee's symptoms and the effects of those symptoms on her ability to function constitutes relevant and essential medical evidence necessary in rendering a reasoned and consistent decision.

The District Court when conducting a de novo review of a decision of an ERISA plan administrator should exercise its discretion in allowing evidence not before a plan administrator when such evidence is relevant and essential to conduct an fair and impartial judicial review of that decision. In the Petitioner's case at hand, the admission of the medical records as withheld by the local plant personnel would serve an indispensable evidentiary purpose. The withholding of this medical evidence was undertaken by some of the named defendants who stood accused of discriminatory actions against this employee. Review of the medical file withheld by local plant management would address the issue of not only the arbitrary and capricious nature of determining eligibility for benefits without benefit of such medical information fully available to the Dupont Plan administrator, but also would address the denial of these benefits as a discreet, interrelated act of discrimination by the named defendants. Concealment of medical files and records

specifically gathered and maintained by Dupont to address and document an employee's state of health and well-being constitutes a possible act of employment discrimination if done out of an illegal bias. This supports a possible violation of not only ERISA, but Title VII of the Civil Rights Act as well.

In determining whether to grant a motion to introduce evidence not presented to an ERISA plan administrator, a court should address why the evidence proffered was not submitted to the plan administrator and, if the administrative procedures did not allow for or permit introduction of the evidence, admission in the District Court may be warranted. *Quesinberry v Life Ins. Co. of North America*, 987 F.2d 1017 (4th Cir. 1993).

Petitioner asserts that the legal sanctioning or acceptance of a manipulation of an administrative record by a plan administrator or representatives of an employer by intentional selectivity in what medical evidence will be reviewed and considered permits any administrator or company to simply construct a record in keeping with the decision they wish to ultimately reach. If a denial is desired, it becomes a simple matter of withholding relevant and probative medical evidence supportive of the claim from the administrative record. Any decision becomes automatically justifiable by virtue of the calculatedly designed record.

Petitioner seeks a review of this issue of the selective compilation by an employer of available medical evidence as an administrative record, as this clearly serves as an avenue by which unlawful or discriminatory denial of employee benefits can be ostensibly achieved. Further, a District Court cannot fairly determine if available medical evidence not

reviewed in arriving at any denial of benefits was an abuse of discretion or, even more reprehensibly, a clear act of intentional discrimination to harm a targeted employee or class of employees.

III. A District Court has abused its judicial discretion in finding that insufficient evidence was proffered to prove a claim of hostile work environment wherein the court has prohibited all discovery pertaining to the subject workplace environment.

The Supreme Court, in an opinion written by Justice Rehnquist, held in *Celotex Corp. v. Catrett*, 477 U.S. 317, 196 S. Ct. 2548 (1986) that Rule 56(c) mandates the entry of summary judgment only after adequate time for discovery. Inherent and intrinsic to that opinion is the understanding that relevant discovery needs to be reasonably complete as to the material issues raised in any litigation . The complete absence of any relevant discovery into the overall work environment, the pattern and practice of the particular harassers at issue, and the complete exemption from all discovery of any material and relevant information necessary to prove the motives and intent behind particular acts committed against a Petitioner, render legally impossible any finding by a court as to the existence of a sexually hostile work environment or the validity of any claims of sexual harassment of any employee.

It is widely acknowledged that women fear coming forward for a variety of reasons, including a sincere distrust that the legal system will fairly address their claims and that, in fact, litigation of sexual harassment may be just as

damaging and emotionally injurious as the acts of harassment themselves. J. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 39 Emory L.J. (Winter, 1994).

The Petitioner herein was denied all means by which to gather evidence pertaining to her work environment and its sexually hostile nature, and had all of her claims subsequently dismissed based upon a finding that she had failed to satisfactorily proffer evidence as to the existence of a hostile work environment in her case. This is tantamount to constructing an administrative record for review wherein necessary evidence has been excluded to permit a specific finding that objective evidence is missing.

It is well established law that whether or not there exists a hostile work environment is to be determined by the totality of the circumstances, concentrating not on individual incidents as the District Court did in this case, but on the overall scenario. *Burns v. McGregor Elec. Indus., Inc.*, 955 F. 2d 559 (8th Cir., 1992), remanded, 807 F. Supp. 508 (N.D. Iowa 1992), rev'd, 989 F. 2d 959 (8th Cir., 1993); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991); *Andrews v. City of Philadelphia*, 895 F. 2d 1469, 1484 (3d Cir., 1990); *Vance v. Southern Belle Tel. & Tel. Co.*, 863 F. 2d 1503, 1510 (11th Cir., 1989).

A single incident or incidents held apart from the totality of the Petitioner's work experience, including the open treatment of co-workers, is the very antithesis of what each and every court has relied upon to weigh and consider possibly the existence of a hostile work environment in any cause of action. The Supreme Court held in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) that in order for

sexual harassment to violate Title VII, it must be shown to be "sufficiently severe or pervasive to alter the conditions of the employment and create an abusive work environment". In determining severity and pervasiveness, the work environment is to be looked at as a whole and not divided into a series of discreet incidents measured separately. *Robinson*, supra; *Andrews*, supra. The barring of all discovery into employee grievances, incidents of quid pro quo harassment, and some of the defendants' sexual relations with subordinate workers constructed a posture wherein the District Court could not but find that Petitioner had proffered insufficient evidence of a sexual and openly-hostile workplace in this case.

As established by the decision rendered in *Ellison v. Brady*, 924 F.2d 872 (9th Circ., 1991), to prove a hostile work environment a litigant must show that a reasonable woman would perceive these actions as hostile, intimidating and offensive. The District Court fully cognizant of the evidence necessary to prove a hostile work environment closed the door to discovery of that very evidence by its severely restricted discovery. A Petitioner does not have to be physically touched or directly asked for sex in order to sufficiently prove the existence of a sexually-charged workplace and/or a hostile work environment. *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988).

Petitioner seeks review of the discovery in this matter to establish that any finding by the District Court as to the nature of the workplace environment at issue and any discriminatory conduct by her employer and its representatives in that environment required far more relevant and open inquiry into that environment than the carefully restricted discovery she was permitted, wherein only Deborah

H. Cobb was examined, analyzed and assessed as to motive, intent, and conduct.

In *Meritor*, supra, this Court set forth very clear standards for establishing that sexual harassment has occurred which violates Title VII. This Petitioner asks for a fair review of her case to determine how any finding could have been rendered as to the severity or pervasiveness of the conditions in her workplace when the workplace was shielded and held exempt from all scrutiny by orders entered by the Court barring such inquiry. The Petitioner herein alone was scrutinized and discovery was held to virtually only her conduct and work behavior. Discovery focused on only her work experiences, sex life, private documents, and overall behavior and, therefore, legally precluded any reasonable findings beyond that narrow scope.

Petitioner's counsel was not permitted one unobstructed deposition, any inquiry into any corroborative incidents of sexual harassment, direct questioning into the sexual conduct of the defendants at the workplace, or any other standard discovery into the nature of the work environment at issue as established by this Supreme Court as relevant and essential to proving sexual harassment and a hostile work environment.

Petitioner prays that this Court will review the conduct and proceedings in this case as such conduct and proceedings represent an egregious departure from this Court's previous rulings and opinions as to the course and conduct of such causes of action.

CONCLUSION

The question of an employer's intent to discriminate is a "pure question of fact". *Pullman Standard v. Swint*, 465 U.S. 273 (1982). The Petitioner seeks review of this case in that the facts cannot be known from the dissection of her work environment into little pieces judged as only unrelated and distinct incidents without relevance or effect on one another.

The manner in which Petitioner was forced to leave her employment without any employee benefits was considered in this case in isolation and was diminished by its very segregation down to merely a weighing of selected medical reports and the memorializing of an employer's assessment of the sufficiency of those medical reports. The manner in which the Petitioner left Dupont was itself an interrelated act of discrimination, trailing behind a series or pattern of discriminatory acts. The withholding of Petitioner's plant medical file by local plant management from any administrative review in order to facilitate and support a denial of benefits is just one example of the ongoing discriminatory conduct and cannot be deemed as merely capricious and arbitrary but must be considered as part of a pattern of adverse employment actions and, thus, becomes a violation of this Petitioner's civil rights.

The manner in which any employee is denied a fair administrative hearing by an employer or is compelled to leave employment without adequate benefits earned through years of employment cannot be adequately judged, if considered as only separate and unrelated acts from all other previous incidents and treatment as meted out to that employee. Petitioner seeks review of the manner in which

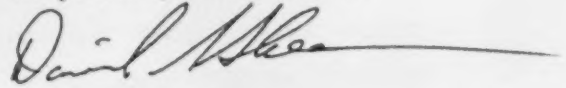
she was denied any benefits and left Dupont's employment, not in the narrow light of ERISA alone, but in the full light of a discriminatory course of conduct in direct violation of her civil rights. Such a consideration of her last years of employment and her employer's last acts toward her are essential to the finding of any truth as to the defendants' intent and motives in their treatment of this employee.

It has become far too easy for employers to eliminate their employees and legally justify this treatment as reasonable and perfectly nondiscriminatory. In the instant matter, had the District Court permitted Dupont's administrator to respond in trial to inquiry regarding the complete medical evidence as contained in the Petitioner's own plant medical file, which was compiled and maintained by Dupont, and then withheld from review by Dupont, the questions of fact as pertaining to intent or possible motive would have become more easily searched out, identified and judged. It would certainly have exceeded the legal boundaries and issues related to ERISA.

The Petitioner respectfully prays that her petition for certiorari be granted. The conduct of employers around these issues involving the granting or denying of employee benefits has become a crucial issue in the workplace. It has become the legal focus of companies in planning to terminate employment for numbers of their employees, without having to address the underlying discrimination that often prompted the choice of which employee is to go and which employee will remain. Those that remain grow fewer in the competitive business environment, and those who must go should not legally go empty handed without that which they have earned. This is clearly employment discrimination as

much as any failure to promote, hire, or fairly compensate an employee.

Respectfully submitted by,



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Dated: December 2, 1998